INDEX

Subject Index

	Page
Petition for Certiorari	1
Brief of Counsel in Support	9

Table of Cases Cited

Whitney v. *California*, 274 U. S. 357	9
Mooney v. *Holohan*, 274 U. S. 103	9
People, etc. v. *Zimmerman*, 278 U. S. 63	9
Davis v. *Burke, Sheriff*, 179 U. S. 399	9
U. S. ex rel, etc. v. *Kennedy*, 269 U. S. 13	9
Pyle v. *Kansas*, 317 U. S. 213	10
Hawk v. *Olson*, 326 U. S. 271	11
Wade v. *Mayo*, 334 U. S. 672	11
State v. *Baltimore Radio Show*, 705 S. Ct. 252	11
Darr v. *Burford*, 70 S. Ct. 587	12
Frank v. *Manghum*, 237 U. S. 309	12
Saia v. *New York*, 334 U. S. 558	12
Cantwell v. *Conn*, 310 U. S. 296	12
Marsh v. *Alabama*, 326 U. S. 501	13
Lovell v. *Griffin*, 303 U. S. 444	13
Francis v. *Resweber*, 329 U. S. 459	13
Ga. Bar Ass'n Rep'ts, 1919	11

Statutes Cited

Constitution of the United States, 14th Amendment	2
Constitution of the United States, 6th Amendment	4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No.

JOHN WALLACE,

Petitioner

vs.

A. B. FOSTER, Sheriff of Fulton County, Georgia

Respondent.

PETITION FOR WRIT OF CERTIORARI DIRECTED TO THE SUPREME COURT OF GEORGIA TO REVIEW A DECISION OF SAID COURT.

To the Honorable Chief Justice of the United States, and the Honorable Associate Justices of the Supreme Court of the United States:

John Wallace, a citizen of the United States and of the State of Georgia, brings this petition for the writ of certiorari to be directed to the Supreme Court of the State of Georgia for the purpose of obtaining in this Honorable Court a review and, if comformable to law, a reversal of a decision of the Supreme Court of the State of Georgia, entered finally on the 15th day of March, 1950, (R 98) in the case of John Wallace, Plaintiff in Error, vs. A. B. Foster, Sheriff, Defendant in Error, docketed in said court as case Number 16924.

The Supreme Court of Georgia has appellate jurisdiction in such cases and is the highest court of the State of Georgia in which a decision in this case could be had.

PART I.

SUMMARY OF MATTER INVOLVED.

1.

On the 16th day of September, 1949, petitioner filed in the Superior Court of Fulton County, Georgia, his petition for the writ of habeas corpus, (R 1) and the same was sanctioned and directed to the Hon. A. B. Foster, Sheriff of said County, the respondent, and made returnable on the 24th day of September, 1949. On the hearing the trial court entered an order denying the writ (R 13).

2.

Petitioner here contends that the conduct of the trial in the state court in which petitioner was convicted, and the methods employed by officers of the state and of the county of Coweta (where the trial was had) to obtain a conviction deprived him of his life and his liberty without due process of law, and in violation of his rights under the 14th Amendment to the Constitution of the United States, which reads, in part:

> ". . . no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws"

for that

(i) The said officers procured the false testimony of two accomplices, upon which testimony conviction was had, by inducing them by promises and grant of immunity from prosecution to waive their constitutional right to refuse to

testify to matters tending to criminate themselves and to testify falsely against petitioner;

(ii) The said officers suppressed the testimony of two accomplices whose testimony would have acquitted petitioner (if accepted by the jury) by inducing them, by promise and grant of mitigated sentence, to claim their constitutional right to refuse to testify to matters tending to criminate themselves, and thus suppressed testimony favorable to petitioner;

(iii) The active participation in the trial of the case by the prosecutor, namely: A. Lamar Potts as Sheriff, after having posted and paid out of his personal funds $500.00, for information against petitioner, by drawing the grand jury which returned the indictment; by drawing of the traverse jury which tried the case, serving the summons on each of the jurors composing said grand and traverse juries; by attending the said juries and having their custody as they performed their several functions in connection with petitioner's indictment, trial and conviction; and by otherwise functioning as an official of the court which tried and convicted petitioner, thereby performing the dual role of prosecutor and court official;

(iv) The said prosecutor-sheriff held the only witnesses having knowledge of the facts pertinent to petitioner's defense incommunicado and refused to permit either petitioner or his counsel or his friends from communicating with them, although prosecutor and the State's counsel had unlimited opportunity to consult with them, and thus prevented any factual development of petitioner's defense;

3.

Petitioner here contends that he was denied the right to a speedy and public trial by an impartial jury free from influence such as is contemplated by the 6th Amendment to the Constitution of the United States, and was denied the right to be confronted with the witnesses against him,

in violation of his rights under the 6th Amendment to the Constitution of the United States, which provides:

> "In all criminal prosecutions, the accused shall enjoy the right to speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

for that:

(i) The active efforts of two cosmopolitan newspapers having general circulation in the county wherein petitioner was compelled to stand trial, and general circulation throughout the State of Georgia, to prejudice each prospective juror against petitioner by utterly false news stories, editorials, magazine articles, and radio broadcasts which robbed petitioner of a fair and impartial trial; and by threatening editorials directed to the Board of Pardons and Paroles of the State of Georgia while petitioner's case was pending before such board, in an effort to intimidate and control the judgment of its several members, which news stories and editorials did rob petitioner of the uninfluenced judgment of members of said Board, petitioner being without any means or opportunity whatever to answer any of such editorials or news stories or magazine articles, or radio broadcasts.

4.

The Supreme Court of Georgia ignored the federal rules applicable in the case; ignored the federal questions presented, and applied rules governing procedure applicable only in cases based upon rights arising under statutory laws of the State. The basic questions were left untouched, but the practical effect of the decision was to decide the questions in a way probably not in accord with applicable decisions of this court.

PART II.

STATEMENT OF BASIS OF JURISDICTION

Petitioner states that this Court has jurisdiction to review the decision complained of by reason of authority granted in U. S. C. A. Title 28, Sec. 1257 (3) and Rule 38½ of this Court:

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by appeal, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had * * * where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution * * *"

Petitioner contends that the Supreme Court of the United States has jurisdiction to entertain and sanction this petition for certiorari, and to grant the relief sought by petitioner because substantial federal questions are present and presented in the case, as follows:

(a) Whether the conduct of his trial in the State court, and the methods there employed to bring about his conviction and sentence to death, as specifically set forth in subparagraphs i, ii, iii, and iv of Paragraph 2, Part I of this petition for certiorari violates petitioners rights under the Fourteenth Amendment of the Constitution of the United States.

(b) Whether the constant flooding of inflammatory and false and prejudicial matter [evidence] into the great court of public opinion, with no right or opportunity to defend, as is specifically set out in sub-paragraph (i) of paragraph 3, Part I of this petition constitutes a violation of petitioner's right guaranteed him by the Sixth Amendment to the Constitution of the United States.

PART III.

REASONS RELIED UPON FOR THE SANCTION OF THIS PETITION.

Petitioner most respectfully contends that this Honorable Court ought to permit the filing of this petition and sanction the same and review the opinion and judgment complained of for these reasons:

(a) Because no claim of right urged by petitioner, accruing to him under the Federal Constitution, has at any time been noticed, or adjudicated by any court, the Supreme Court of Georgia having ignored the federal questions to deal merely with State court rules involving procedure in State courts, and thereby decided the questions, in effect, in a way probably not in accord with applicable decisions of this court;

(b) Because substantial federal questions are timely presented;

(c) Because the methods employed to bring about petitioner's conviction, as outlined in Part I of this petition, are outside any scheme of well ordered liberty and shock the conscience of justice;

(d) Because this petition for certiorari sets forth questions of deep public concern in that they involve questions affecting the administration of criminal jurisprudence in the several states under democratic processes which the people of the United States have laborously worked out under the Federal Constitution.

PART IV.

THE ASSIGNMENTS OF ERROR AND PORTIONS OF THE RECORD NECESSARY FOR CLEAR UNDERSTANDING.

Error is assigned on the making and entering of the judgment of the Supreme Court of Georgia, dated on the 15th

day of March, 1950, based upon an opinion of said court dated February 13th, 1950, and assigns error upon that opinion (R 98).

The following portions of the record in the case, duly certified to be true and correct by the Clerk of the Supreme Court of Georgia, under seal of that court, are filed concurrently with the filing of this petition, to-wit:

1. The petition for habeas corpus filed in Fulton Superior Court on the 16th day of September, 1949, together with filing entry, rule issued thereon and acknowledgment of service (R 1).

2. The response filed by A. B. Foster, Sheriff, Respondent, on the 24th day of September, 1949, less the exhibits, which are in nowise material to a clear understanding of the case (R 7).

3. The bill of exceptions filed in Fulton Superior Court by petitioner on the 17th day of October, 1949, together with the order of the court certifying the same as true and ordering the Clerk to transmit the case to the Supreme Court of Georgia, and the filing entry of the Clerk of the Supreme Court of Georgia showing the filing and docketing of the case in that court (the said bill of exceptions contains all of the evidence necessary to a clear understanding of the errors here complained of) (R 13).

4. The opinion of the Supreme Court of Georgia entered in the case on the 13th day of February, 1950, (R 89).

5. The motion for rehearing filed by this petitioner on the 22nd day of February, 1950, together with all amendments, and the certificate of service (R 94).

6. The order of the Court denying a rehearing in the case entered on the 15th day of March, 1950, (R 98).

7. The motion to stay the remittitur addressed to the Chief Justice Supreme Court of Georgia and the order thereon, dated March 16th, 1950, (R 98).

8. The order of the Chief Justice of the Supreme Court of Georgia staying the execution, (R 99).

Petitioner avers that the portions of the record catalogued above and transmitted constitute the entire record necessary to a clear understanding of the errors here complained of.

PART V.

PETITIONER'S PRAYER.

WHEREFORE, your petitioner prays that an order be now entered granting and sanctioning this petition for certiorari; that the certified transcript of proceedings of said court in the cause entitled upon its docket as John Wallace, Plaintiff in Error, vs. A. B. Foster, Defendant in Error, number 16924, transmitted herewith, be treated as though sent up in response to a formal writ; that said cause may be reviewed and determined by this court, and that petitioner have such other and further relief in the premises as this Honorable Court may deem appropriate.

Gus A. Huddleston,
Greenville, Georgia.

Allen Lumpkin Henson,
413-20 Connally Bldg.,
Atlanta 3, Georgia.
Petitioner's Counsel

BRIEF IN SUPPORT OF PLAINTIFF'S PETITION FOR CERTIORARI.

PART I

The Factual Basis

The factual basis will clearly appear from the record; the initial petition (R 1, et. seq.); the response (R 7, et seq.); the summary written by the Supreme Court of Georgia (R 91, et. seq.) and particularly subsection q of paragraph 12 of Respondent's answer (R 11), and the evidence adduced upon the trial (R 15, et. seq.).

PART II.

Brief of Authorities

This petitioner has invoked all of the corrective judicial process afforded by the State, inclusive of the pardoning and parole power. No further judicial remedy afforded by the state remains open. It affirmatively appears on the face of this record that a federal question constituting an appropriate ground for review here was presented in the State courts and was "expressly or necessarily" decided by the State court. This court has uniformly assumed jurisdiction in such cases. In *Whitney* vs. *California* this court referred to this rule as having been long settled, citing copious authority in support.

Whitney vs. *California*, 274 U. S. 357, 360.

See also:

Mooney vs. *Holohan*, 274 U. S. 103
People, etc. vs. *Zimmerman*, 278 U. S. 63
Davis vs. *Burke*, Sheriff, 179 U. S. 399
U. S. ex rel, etc. vs. *Kennedy, et al*, 269 U. S. 13.

Habeas Corpus initiated in the State court is an available remedy to persons imprisoned in violation of rights guaranteed by our Federal Constitution, and determinations there are reviewable by this court.

Pyle vs. *Kansas*, 317 U. S. 213.

The Pyle case, cited immediately above, closely parallals the case at bar.

The allegations in that case, as in this one, were that officers of the State (1) knowingly used perjured testimony and (2) deliberately suppressed testimony to obtain a conviction. This court said:

> "Habeas Corpus is a remedy available in the courts of Kansas to persons imprisoned in violation of rights guaranteed by the Constitution of the United States . . . they set forth allegations that his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him. These allegations sufficiently charge a deprivation of rights guaranteed by the Federal Constitution . . ."
>
> *Pyle* vs. *Kansas*, Supra.

Federal Court will look to events infringing rights under Federal Constitution even though they do not appear upon the face of the record.

Federal Court will determine whether conviction occurred under such influence as will deny due process.

Where state does not provide corrective judicial process, federal courts will entertain habeas corpus to redress violation of federal constitutional right in criminal proceedings in State courts.

When the corrective process is provided by the State but error, in relation to the federal question of constitutional violation creeps into the record, the federal courts have the responsibility to review the proceedings.

More than a "bare legal review" of authority under which a prisoner is held was enjoined upon federal courts by an Act of Congress of 1867.

Hawk vs. *Olson*, 326 U. S. 271.

No adjudication in a State court involving a federal question becomes res judicata, to rob federal courts of jurisdiction.

Federal court may entertain petition for habeas corpus and determine merits of constitutional claim, though defendant had not availed himself of the remedy of appeal.

Wade vs. *Mayo*, 334 U. S. 672.

The news services, inclusive of editorial writers, feature writers and radio commentators went far beyond objective reporting. Some of these were directed specifically at constitutional agencies of the State government and were timed to cover the State on the very day previous to hearings had in the case. They were quite as effective as a show of violence.

A thesis by Judge Samuel H. Sibley, of the Fifth Circuit Court of Appeals, entitled "The Informal Law," is probably the greatest legal-philosophical literature illustrating plaintiff's contention that the decrees of the informal courts —the great court of public opinion—are effective far above the decrees of the formal courts.

Georgia Bar Ass'n Reports, 1919.

Mr. Justice Frankfurter wrote a learned opinion in *State* vs. *Baltimore*, etc. discussing and quoting interesting cases by this and English courts which will illustrate the helpless state of this petitioner to protect himself against this avalanche of prejudicial publicity which weighed so heavily against him. The Justice quotes Lord Hardwiche in the case of the St. James Evening Post (in 1742), in which that great English jurist dealt with publicity "prejudicing mankind against persons before their case is heard".

State vs. *Baltimore Radio Show, Inc.*, 705 S. Ct. 252.

Mr. Justice Reed, after exhaustive research, and in the

recent case of *Darr* vs. *Burford*, treated every question here presented. The majority opinion in that case quieted the troublesome question of comity which disturbed the Justices who wrote the dissenting opinion, namely: the power of federal courts to entertain applications for a writ of habeas corpus on behalf of state prisoners.

We have carefully checked the prerequisites outlined by this court in that case to taking jurisdiction in the character of cases here presented. Every prerequisite has been met; we raised each question here presented in the court of first instance; we attack only the sentence being imposed; we did not bring this case to the federal judiciary until "courts of another sovereignty with concurrent powers, and already cognizant of the litigation" had opportunity to pass upon the question presented; we exhausted every remedy available in the courts of the state.

Darr v. *Burford*, 70 S. Ct. 587.

Reference to the opinion of the Supreme Court of Georgia (R 89) will clearly convince this Court that substantial federal questions were presented but never passed upon, but buried in legalistic requirements (technical rules of procedure in the state courts) at irreconcilable conflict with the rule announced in the fourth headnote of *Darr* v. *Burford*, supra.

In numerous cases this court has held that where the rights invaded by prosecuting officers of a State are basic and fundamental the due process clause of the Fourteenth Amendment includes by implication those guaranteed by the Bill of Rights.

Frank vs. *Manghum*, Sheriff, 237 U. S. 309.

(Dissenting opinion of Justices Hughes & Holmes).

See also:

Saia vs. *New York*, 334 U. S. 558
Cantwell vs. *Conn*, 310 U. S. 296

Marsh vs. *Alabama*, 326 U. S. 501
Lovell vs. *Griffin*, 303 U. S. 444
Francis vs. *Resweber*, 329 U. S. 459.

Respectfully submitted,

Gus A. Huddleston,
Greenville, Georgia.

Allen Lumpkin Henson,
413-420 Connally Bldg.,
Atlanta, Georgia.

INDEX

Page

I. Statement of the Case 1

II. Argument and Citation of Authorities 4

1. The trial court's judgment upon the facts is amply supported by the evidence and was properly left undisturbed by the Supreme Court of Georgia 4

2. The use of false testimony deprives one on trial of due process only when it is deliberately used with knowledge of its falsity 5

3. The refusal of witnesses to testify because of a fear of self incrimination does not deny due process to a defendant on trial who might be benefited by their testimony 6

4. Habeas corpus is not an appropriate remedy to review those aspects of the trial for murder which could have been properly placed in issue on the murder trial 7

5. The fact that press and radio commented unfavorably to petitioner affords no reason for his release on habeas corpus ... 8

6. The decision of the Supreme Court of Georgia here under review contains no error with respect to the Federal Constitutional question 9

III. Conclusion 10

IV. Appendix 11

TABLE OF AUTHORITIES

Cases:	Page
Adamson v. California, 332 U. S. 46, 51	9
Barron v. Baltimore, 7 Pet. 243	9
Betts v. Brady, 316 U. S. 455, 461	9
Bowen v. Johnston, 306 U. S. 19	8
Carter v. Illinois, 329 U. S. 173	8
Delaney v. United States, 263 U. S. 586, 589	5
District of Columbia v. Pace, 320 U. S. 698	5
Eagles v. Samuels, 309 U. S. 304	7
Feldman v. United States, 332 U. S. 487, 490	9
Frank v. Mangum, 235 U. S. 309	9
Hawk v. Olson, 326 U. S. 271	4, 6
Louisiana v. Resweber, 329 U. S. 459, 469	7
Mooney v. Holohan, 294 U. S. 103, 112	4, 6, 8
Moore v. Dempsey, 261 U. S. 86	8, 9
Palko v. Conn., 302 U. S. 319, 325	7
Pyle v. Kansas, 317 U. S. 213	4, 6
Sheppard v. The State, 68 Ga. App. 127	6
Snyder v. Mass., 291 U. S. 105	7
U. S. ex rel Tisi v. Todd, 264 U. S. 131	7
U. S. v. Johnson, 319 U. S. 503, 518	5
Von Moltke v. Gillies, 332 U. S. 708, 740	5
Waley v. Johnston, 316 U. S. 101, 104	7
Wallace v. Foster, 206 Ga. 561, 57 S. E. 2d 920	3, 5
Wallace v. The State, 204 Ga. 676, 51 S. E. 2d 395	2
Wallace v. The State, 205 Ga. 751, 55 S. E. 2d 145	2, 10
Williams Mfg. Co. v. U. S. Shoe Machinery Corp, 316 U. S. 364, 367	5
Woolsey v. Best, 299 U. S. 1	7
Constitutions:	
Constitution of Georgia, Art. I, Sec. I, Par. V	9
Constitution of Georgia, Art. I, Sec. I, Par. VI, (Ga. Code Ann. 2-106)	6
Statutes:	
Georgia Anno. Code, Sec. 59-806	9
Georgia Anno. Code, Sec. 59-807	9
Georgia Anno. Code, Sec. 27-1201	9
Miscellaneous:	
47 Col. Law Rev. 470, "Habeas Corpus in Interstate Rendition"	8

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1949

No. 854

JOHN WALLACE, Petitioner

vs.

A. B. FOSTER, Sheriff of Fulton County, Georgia, Respondent

On Petition For Writ of Certiorari to The Supreme Court of Georgia

Brief of Respondent

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent, A. B. Foster, Sheriff of Fulton County, Georgia, files this brief in opposition to the petition for the writ of certiorari to the Supreme Court of Georgia, filed in this court by John Wallace, petitioner. The Attorney General of Georgia is counsel for respondent Foster by direction of the Governor of Georgia.

I. STATEMENT OF THE CASE

The petitioner, John Wallace, was indicted, tried and convicted in Coweta County Georgia of the offense of murder and sentenced to death by electrocution. Although peti-

tioner was tried alone, other persons were indicted jointly with him, including Brooks, Gates, Strickland, Sivell and Mobley. The relations of these joint defendants to the case at bar will presently be made apparent.

Following his conviction, the petitioner made a timely motion for new trial which he later amended to attack as erroneous eleven specified rulings of the trial court. This motion for new trial was overruled after argument and the trial court's judment in this respect affirmed on appeal. *Wallace v. The State,* 204 Ga. 676; 51 S. E. 2d 395.

Thereafter, under appropriate state procedure, petitioner made an additional "extraordinary motion" for new trial upon the ground, *inter alia,* that certain material evidence had become available to him since his conviction tending to show that the victim was alive and well in Meriwether County after the infliction in Coweta County of the blows which the State contended produced his death. This motion was accompanied and supported by affidavits of joint defendants Sivell and Mobley who, since the conviction of Wallace, had voluntarily accepted verdicts of guilty with recommendation of mercy and, in consequence, been sentenced to life imprisonment. (R. 36 and 38) Upon the murder trial of Wallace these witnesses were sworn on behalf of petitioner but, acting on advice of counsel (R. 35 and 39), refused to testify for fear of incriminating themselves. This extraordinary motion for new trial was denied by the trial court and its judgment affirmed on appeal, *Wallace v. The State*, 205 Ga. 751; 55 S. E. 2d 145. In its opinion affirming this judgment the Supreme Court of Georgia pointed out that one other joint defendant, Strickland, was shown by the record to have had the same opportunity to know the facts deposed to by Mobley and Sivell and no effort was made to use him as a witness or explain petitioner's failure to do so.

By the instant petition for habeas corpus Wallace sought to have the Superior Court of Fulton County, Georgia, where he was then incarcerated, declare his conviction void as wanting in due process in that:

(a) Brooks and Gates, jointly indicted with petitioner, witnesses for the State, testified falsely and that their false testimony was procured by officers of the State by promises of immunity from prosecution should they waive their constitutional immunity from self-incrimination;

(b) These officers suppressed the testimony of Mobley, Sivell and Strickland by inducing them to claim their immunity from self-incrimination;

(c) The Sheriff of Coweta County, A. Lamar Potts, paid a reward from his personal funds for information against petitioner and, by his partisan activity on behalf of the prosecution, rendered himself incompetent to serve summons upon grand and petit jurors and otherwise function as an officer of the court, which functions he nevertheless undertook to perform;

(d) This sheriff held material witnesses, who had knowledge of facts material to petitioner's defense, incommunicado and denied petitioner's counsel opportunity to consult with them;

(e) False reports, prejudicial to defendant, were circulated by press and radio, thereby denying him the right to a fair and impartial trial. (R. 1-6)

In the trial court the respondent did not demur or otherwise attack the legal sufficiency of the petition. A response was filed to the petition which created issues of fact on many material allegations and set up by way of exhibits the entire record of prior proceedings. (R. 7-12) Upon the issues thus created the trial judge heard evidence and argument and, after consideration, entered judgment denying the writ. (R. 13) The Supreme Court of Georgia affirmed on appeal. *Wallace v. Foster*, 206 Ga. 561; 57 S. E. E. 2d 920; (R. 89). Petitioner now seeks review and reversal of this judgment,

contending that error with respect to the Federal Constitutional question crept into this decision.

II. ARGUMENT AND CITATION OF AUTHORITIES

1. The trial court's judgment upon the facts is amply supported by the evidence and was properly left undisturbed by the Supreme Court of Georgia.

Unlike *Pyle v. Kansas*, 317 U. S. 213, *Mooney v. Holohan*, 294 U. S. 103 or *Hawk v. Olson*, 326 U. S. 271, the trial court did not dispose of the petition for habeas corpus upon the pleadings. By receiving evidence it permitted the petitioner to open an inquiry into the very truth and substance of the causes for his detention. Having heard this evidence, the court passed upon and determined the issues of fact as it was inescapably its duty to do. Our task here would have been simpler had the trial court made separate and detailed findings on each of the controverted facts but such findings are not required under Georgia procedure. The evidence amply supported, if it did not in fact demand, the judgment which was rendered. The testimony alleged to be perjured was reaffirmed as true. The witnesses who gave the testimony thus attacked insisted that they gave it willingly and without coercion and because they wished to testify. In testifying on this hearing to the truthfulness of what they swore at the murder trial and of their freedom from coercion, these witnesses, Brooks and Gates, were sworn on behalf of petitioner and he is concluded by their testimony. Counsel expressly disclaimed entrapment by them. (R. 16) Not only did petitioner's proof fail to establish the falsity of this testimony, but it was entirely deficient in showing that the officers for the State had any reason to believe the testimony to be false.

Testimony of witnesses, Mobley, Sivell and Strickland, alleged to have been suppressed, was shown by petitioner's own evidence to have been withheld because of the advice of counsel of these witnesses and not as the result of some scheming and malevolent purpose of the prosecution. (R. 35 and 39)

No evidence showed that the petitioner was in any way injured by the zealous or even partisan activity of the sheriff nor was any reason shown why this issue could have been raised by appropriate motion for change of venue, by challenge to the array of jurors, or by other appropriate means upon the original trial.

The evidence wholly fails to show diligence or indeed any effort at all by petitioner's counsel to see the witnesses whom it was alleged were held incommunicado, or any application to the trial Judge for leave to confer with the persons so held.

Unfavorable comment by press and radio was not shown to have prejudiced any juror, or to have created an atmosphere of mob domination at the time of the trial. Nor is any reason given why the petitioner's rights in this respect must be asserted by an application for writ of habeas corpus, rather than by timely motion for change of venue or other like motion in the murder trial.

Respondent respectfully insists, therefore, that the findings of fact by the trial Judge should be accepted. *Von Moltke v. Gillies,* 332 U. S. 708, 740. His appraisal of the living record is entitled to respect and reliance. *District of Columbia v. Pace,* 320 U. S. 698; *United States v. Johnson,* 319 U. S. 503, 518; *Williams Manufacturing Co. v. United Shoe Machinery Corporation,* 316 U. S. 364, 367; *Delaney v. United States,* 263 U. S. 568, 589.

2. The use of false testimony deprives one on trial of due process only when it is deliberately used with knowledge of its falsity.

No ruling of the trial court was envoked on the legal sufficiency of the application for habeas corpus. On appeal, however, the Supreme Court of Georgia stated, *Wallace v. Foster,* supra, that on the petition release should be denied as a matter of law. We now suggest that this application might have been successfully attacked as to the first of the grounds relied upon because there is no allegation that the perjured testimony was knowingly and deliberately used. It has never been decided that habeas corpus is available as a

remedy simply to question for a second time the truth of testimony upon which a conviction was had. This court has clearly stated and limited such an attack in *Mooney v. Holohan,* 294 U. S. 103, 112, to those cases where:

> " . . . the State has *contrived* a conviction *through the pretense of a trial* which in truth is but used as a means of depriving a defendant of liberty through a *deliberate* deception of the court and jury by the presentation of testimony *known* to be perjured." (Emphasis supplied)

Pyle v. Kansas, 317 U. S. 213, places the same emphasis on the "knowing use" of such perjured evidence by the State. To the same effect is *Hawk v. Olson,* supra. After the reception of evidence upon the trial of this application it became abundantly clear that the application for the writ failed to charge a knowing use of perjured evidence because petitioner was without evidence to support such a charge rather than because of any technical deficiency in the drafting of pleadings.

3. The refusal of witnesses to testify because of fear of self incrimination does not deny due process to a defendant on trial who might be benefited by their testimony.

Petitioner's argument here that the claim of immunity by Mobley and Sivell deprived him of due process has the charm of novelty. Such immunity from self incrimination is guaranteed them by the Georgia Constitution, Article I, Sec. I, Par. VI, Georgia Code Ann. 2-106 in the following language:

> "No person shall be compelled to give testimony tending in any manner to criminate himself."

Should such a witness fail to claim his immunity and testify voluntarily, his testimony may be used upon a subsequent trial. *Sheppard v. The State,* 68 Ga. App. 127. No express provision of the Federal Constitution purports to guarantee to a defendant the use of the testimony of a witness who is unwilling to incriminate himself, and it can hardly be said in the

light of history that a right to use of such testimony is "implicit in the concept of ordered liberty" and thus guaranteed to him by the Fourteenth Amendment to the United States Constitution. *Palko v. Connecticut,* 302 U. S. 319, 325. Denial to a defendant of such testimony does not "offend some principle of justice so rooted in the traditions and conscious of our people as to be ranked as fundamental." *Snyder v. Mass.* 291 U. S. 105. The due process clause of the Fourteenth Amendment does not withdraw the freedom of a State to enforce its own measures of fairness in the administration of criminal justice unless it offends principles of justice so rooted and so fundamental. *Louisiana v. Resweber,* 329 U. S. 459, 469. Since we cannot say that it is repugnant to the conscious of mankind for a State to compel the trial of one accused of crime although he is denied access to the testimony of witnesses who claim their immunity from self-incrimination, we cannot say that petitioner's trial was wanting in due process for this reason.

4. Habeas corpus is not an appropriate remedy to review those aspects of the trial for murder which could have been properly placed in issue on the murder trial.

As stated by Mr. Justice Douglas in *Eagles v. Samuels,* 309 U. S. 304,

> "It is elementary that habeas corpus may not be used as a writ of error."

United States ex rel Tisi v. Todd, 264 U. S. 131; *Woolsey v. Best,* 299 U. S. 1. Formerly habeas corpus afforded only a bear legal review to determine whether or not the court had jurisdiction and an inquiry into matters *de hors* the record was in no case permitted. The only exception to this rule has been clearly stated in *Waley v. Johnston,* 316 U. S. 101, 104, where the court in substance said that only when "conviction has been in disregard of the constitutional rights of the accused, and *where the writ is the only effective means of preserving his right*" (emphasis supplied) may habeas corpus be used to open inquiry into the intrinsic fairness of proceedings resulting in incarceration, such proceedings being unas-

sailable upon the face of the record. To the same effect are *Moore v. Dempsey,* 261 U. S. 86; *Mooney v. Holohan,* 294 U. S. 103, *Bowen v. Johnston,* 306 U. S. 19; and *Carter v. Illinois,* 399 U. S. 173. It is the absence of adequate State corrective measures that constitutes the denial of due process. *Habeas Corpus in Interstate Rendition,* 47 Col. Law Rev. 470. The alleged disqualification of the sheriff to act on account of prejudice, the denial of access to State's witnesses and the unfavorable comment upon his case by press and radio present matters which, if hurtful to petitioner, could and should have been raised on the murder trial. Among the remedies provided by Georgia for raising such issues are motion for continuance and motion for change of venue. Although there is no express statutory provision which permits it, we submit that the trial court had full authority by order to allow petitioner's counsel to confer with a prisoner awaiting trial on an indictment pending in that court. It was not want of appropriate process, but petitioner's failure to take advantage of available process which prevented these questions from being put in issue.

5. The fact that press and radio commented unfavorably to petitioner, affords no reason for his release on habeas corpus.

Petitioner contends that two cosmopolitan newspapers actively endeavored to prejudice each prospective juror against him by publishing false news stories, editorials and radio broadcasts thereby robbing petitioner of a fair and impartial trial. He contends further that this campaign was continued to his detriment while the Board of Pardons and Paroles was considering the grant or denial of clemency. (Pet. for Cert., pp. 3 and 4, Par. 3.) Petitioner concludes that this conduct of newspapers deprived him of the right to trial by *an impartial* jury as contemplated by the Sixth Amendment to the Constitution of the United States. In his petition for habeas corpus it was also contended that this publicity created an atmosphere so hostile as to place him in danger of mob violence in the event of his acquittal.

It is established beyond all question that the Bill of Rights,

when adopted, was for the protection of the individual against the federal government and its provisions were inapplicable to similar actions done by the states. *Barron v. Baltimore,* 7 Pet. 243; *Feldman v. United States,* 332 U. S. 487, 490; *Adamson v. California,* 332 U. S. 46, 51. The Sixth Amendment applies only to trials in federal courts and the specific guarantees contained therein are not incorporated, as such in the due process clause of the Fourteenth Amendment. *Betts v. Brady,* 316 U. S. 455, 461. Georgia's Constitution, Art. I, Sec. I, Par. V, however, does contain such a guaranty in the identical words of the Sixth Amendment. In felony cases each prospective juror must be examined upon his voir dire and found impartial before he may be put upon the accused, 1933 Code of Georgia, Secs. 59-806, 59-807 (Appendix, 13, 14). It is further provided that change of venue may be granted on timely motion should it appear that an impartial jury may not be obtained in the county where the crime was allegedly committed. 1933 Code of Georgia, Sec. 277-1201. (Appendix 11). When the defendant predicates such motion upon a reasonable danger of lynching or mob violence this statute gives him an unqualified right to have an adverse ruling reviewed by the Supreme Court of Georgia and his trial stayed pending the appeal.

Not only do the pleadings and the evidence wholly fail to show that the trial was mob dominated and but an empty formality according to the tests established in *Moore v. Dempsey,* 261 U. S. 86 and *Frank v. Mangum,* 235 U. S. 309, but they also fail to show any effort to employ the remedies provided or to explain and excuse this failure.

6. The decision of the Supreme Court of Georgia here under review contains no error with respect to the Federal Constitutional question.

From what has been said above it seems abundantly clear that the decision of the Supreme Court of Georgia (R. 89 et seq.) is in complete accord with the pronouncements of this court upon the constitutional question. Neither the petition nor the evidence showed petitioner's right to be released upon habeas corpus. Many of the issues which petitioner

sought to raise are of the type which may have been reviewed fully by writ of error. As to the perjured testimony, it was not alleged to be knowingly used and was not proven to be perjured or coerced. With regard to the alleged suppression of testimony, the application for the writ shows that it was unavailable because of a rightful claim of immunity from self-incrimination, irrespective of the motive which prompted the claim. The evidence shows this immunity was claimed upon advice of counsel and shows no improper acts to indue the claim. The evidence fails to show what the testimony might have been had it been available. The exact issue was raised upon extraordinary motion for new trial, was considered on its merits, and relief denied by the trial court whose judgment was affirmed on appeal. Wallace v. State, 205 Ga. 751; 55 S. E. 2d 145.

CONCLUSION

We, therefore, earnestly submit that petitioner has failed to present a substantial Federal question of importance. The judgment of the Supreme Court of Georgia could be reversed on certiorari only upon determination that both the trial court's finding upon the facts was erroneous as a matter of law, and that the application for the writ stated a good case for petitioner's release. Neither of such findings is warranted by the record in this case.

Respectfully submitted,

P. O. Address:
201 State Capitol
Atlanta, Ga.

EUGENE COOK
Attorney General of Georgia

M. H. BLACKSHEAR, JR.
Deputy Assistant Attorney General of Georgia

201 State Capitol
Atlanta, Ga.

EDWARD E. DORSEY
Of Counsel

924 Healey Bldg.
Atlanta, Ga.

APPENDIX

Georgia Constitution, 1945, Art. I, Sec. I, Par. V.
Georgia Code Ann., Cum. Pkt. Pt.
Sec. 2-105:

"Benefit of counsel; accusation; list of witnesses; compulsory process; trial by jury.—Every person charged with an offense against the laws of this State shall have the privilege and benefit of counsel; shall be furnished, on demand, with a copy of the accusation, and a list of the witnesses on whose testimony the charge against him is founded; shall have compulsory process to obtain the testimony of his own witnesses; shall be confronted with the witnesses testifying against him; and shall have a public and speedy trial by an impartial jury."

Georgia Code, 1933,
Sec. 27-1201:

"When and how venue changed.—The defendant in any criminal case in the superior court may move, by petition in writing, for a change of venue, whenever, in his judgment, an impartial jury cannot be obtained in the county where the crime is alleged to have been committed. Upon the motion it shall not be necessary to examine all persons in the county, liable to serve on juries, but the judge shall hear evidence by affidavit or oral testimony in support of or against the motion; and if, from the evidence submitted, the court shall be satisfied that an impartial jury cannot be obtained to try the case, the judge shall transfer it to any county that may be agreed upon by the solicitor general and the defendant or his counsel, to be tried in the county agreed upon. If a county is not thus agreed upon, the judge shall select such county as, in his judgment, will afford a fair and impartial jury to try the case, and have it transferred accordingly. The judge of the superior court of the circuit in which a crime is alleged to have been committed may change the venue for the trial of said case, on his own motion, with or without petition, whenever, in his judgment, the accused party will be lynched, or there is danger of violence being attempted to be committed on

said accused, if carried back, or allowed to remain in the county where the crime is alleged to have been committed. If a motion by petition shall be made by the accused for a change of venue, said judge shall hear the same at chambers, with or without the presence of the accused, at such time and place as he may direct; and if the evidence submitted shall reasonably show that there is probability or danger of lynching, or other violence, then it shall be mandatory on said judge to change the venue to such county as, in his judgment, will avoid such lynching. The petitioner shall have the right to except to the ruling of the court at such interlocutory hearing and the bill of exceptions when signed shall operate as a supersedeas in the trial of said case, until passed on by the Supreme Court: Provided, that said prisoner shall present said bill of exceptions to the judge hearing said motion within six days after the refusal to grant said motion. Said bill of exceptions shall be filed in the office of the superior court clerk of the county of the alleged crime within two days after being signed by the judge, and said clerk shall transmit said bill and the required record of said case as early as possible and not exceeding 10 days from the filing in said office to the Supreme Court. Said case in the Supreme Court shall be heard as soon as possible, taking precedence of all other causes: Provided, that should the Supreme Court not be in session at the time said writ of error is received in said Court it shall be the duty of the clerk of said Supreme Court to at once notify the Chief Justice of said Court, or, in his absence or illness, one of the other Justices of said Court, of the receipt of said writ of error; and it shall be the duty of said Justice to at once convene said Supreme Court for the purpose of hearing said case, and said Supreme Court shall remand said case with directions or pass such final order as may be deemed proper and correct."

Georgia Code, 1933,
Sec. 27-2002:

"When cases tried and when continued.—Every person against whom a bill of indictment is found shall be tried at

the term of the court at which the indictment is found, unless the absence of a material witness or the principles of justice should require a postponement of the trial, and then the court shall allow a postponement until the next term of the court; and the court shall have power to allow the continuance of criminal cases from term to term, as often as the principles of justice may require, upon sufficient cause shown on oath. . . . . "

Georgia Code, 1933,
Sec. 59-803:

"Challenge to the array.—The accused may, in writing, challenge the array for any cause going to show that it was not fairly or properly impaneled, or ought not to be put upon him; the sufficiency of which challenge the court shall determine at once. If sustained, a new panel shall be ordered; if not sustained, the selection of jurors shall proceed."

Georgia Code, 1933,
Sec. 59-806:

"Questions on voir dire on trial for felony.—On trials for felonies any juror may be put upon his voir dire and the following questions shall be propounded to him, viz.:

"1. 'Have you, from having seen the crime committed, or having heard any of the testimony delivered on oath, formed and expressed any opinion in regard to the guilt or innocence of the prisoner at the bar?' If the juror shall answer in the negative, the following question shall be propounded to him:

"2. 'Have you any prejudice or bias resting on your mind either for or against the prisoner at the bar?' If the juror shall answer in the negative, the following question shall be propounded:

"3. 'Is your mind perfectly impartial between the State and the accused?' If the juror shall answer this question in the affirmative, he shall be adjudged and held a competent

juror in all cases where the offense does not involve the life of the accused; but when it does involve the life of the accused, the following additional question shall be put to him:

"4. 'Are you conscientiously opposed to capital punishment?' If he shall answer this question in the negative, he shall be held a competent juror: Provided, nevertheless, that either the State or the defendant shall have the right to introduce evidence before the judge to show that the answers, or any of them, are untrue; and it shall be the duty of the judge to determine upon the truth of such answers as may be thus questioned before the court."

Georgia Code, 1933,
Sec. 59-807:

"Setting aside juror for cause.—If a juror shall answer any of the questions set out in the preceding section so as to render him incompetent, or he shall be so found by the judge, he shall be set aside for cause."

Georgia Code, 1933,
Sec. 70-204:

"Newly-discovered evidence.—A new trial may be granted in all cases when any material evidence, not merely cumulative or impeaching in its character, but relating to new and material facts, shall be discovered by the applicant after the rendition of a verdict against him, and shall be brought to the notice of the court within the time allowed by law for entertaining a motion for a new trial."

Georgia Code, 1933,
Sec. 70-301:

"Time of application; hearing, etc., in vacation; brief of evidence.—All applications for a new trial, except in extraordinary cases, shall be made during the term at which the trial was had; and when the term shall continue longer than 30 days, the application shall be filed within 30 days from the trial, together with a brief of evidence, subject to the

approval of the judge and subject to the right of amendment allowed in applications for a new trial; but all applications herein provided for may be heard, determined, and returned in vacation."

Georgia Code, 1933,
Sec. 70-303:

"Motion made after adjournment of court.—In case of a motion for a new trial made after the adjournment of the court, some good reason must be shown why the motion was not made during the term, which shall be judged of by the court. In all such cases, 20 days' notice shall be given to the opposite party. Whenever a motion for a new trial shall have been made at the term of trial in any criminal case and overruled, or when a motion for a new trial has not been made at such term, no motion for a new trial from the same verdict shall be made or received, unless the same is an extraordinary motion or case, and but one such extraordinary motion shall be made or allowed."